APPEAL NO. 92093
APRIL 24, 1992

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), TEX. REV. CIV. STAT. ANN. arts. 8308-1.01 through 11.10 (Vernon Supp. 1992). On February 10, 1992, a hearing was held in (city), Texas, with (hearing officer) presiding. (This hearing was initially set for January 15, 1992 but was continued on motion of the carrier until February 10, 1992.) The hearing officer found appellant, claimant herein, "did not sustain an injury or occupational disease in the course and scope of employment." Claimant asks the Appeals Panel to find that there was not good cause for continuance of the hearing, that the hearing officer's decision to allow additional discovery was an abuse of discretion, that policy requires strict compliance with the 1989 Act and rules of the Commission, that evidence was erroneously admitted, and that the finding that PD did not have Hepatitis B was against the great weight and preponderance of the evidence.

DECISION

Finding that the decision is not against the great weight and preponderance of the evidence, we affirm.

Claimant is a licensed vocational nurse with approximately 10 years of experience who worked at (employer) until unable to work because of the effects of Hepatitis B. No one controverts that claimant has been diagnosed as having Hepatitis B or that it has affected her ability to work. She worked at employer on January 15, 1991, when she recalls inadvertently sticking herself with a "lancet" (a sharp device used to prick a finger to a certain depth to get a small blood sample), after having used it on a patient, PD. Claimant could not recall any other manner in which she could have gotten Hepatitis B. No other event growing out of her work at employer was alluded to as a cause of the disease. Claimant testified that she does not use drugs and has not had sexual relations other than with her husband in the last two years. Her husband testified he has been tested for Hepatitis B, was found to be negative, and has not had sexual relations other than with his wife.

Claimant and others observed the following symptoms in PD: jaundice, intolerant of feedings, vomiting, complaints of back pain, a history of diabetes, edema, swelling in joints, dark urine, and a rash. PD died on January 20, 1991. Claimant, however, saw nothing in PD's medical chart to lead her to believe PD had hepatitis, and she knew of no hepatitis at employer in the two years she worked there. She believed PD had hepatitis because there was "no other way I could have got it."

PD had been admitted to employer "to die" after experiencing a stroke following coronary artery surgery on November 26, 1990. BM, Director of Nurses at employer, testified that she reviews the medical charts of all patients and has done so since coming to employer in April 1988. One reason she reviews charts is to identify diseases that could place other patients or staff at risk. She stated that there had never been a case of Hepatitis

B at employer since she has been there. She said some symptoms that PD had were more pronounced than normally seen in others who were about to die but were not "unusual" for a patient close to death. PD had a blood test five days before death that was within normal limits. In her opinion, PD did not have hepatitis. On cross-examination reference was made to the report of bypass surgery on PD which showed that her own blood had been previously drawn and was used to counteract blood loss. BM agreed that during surgery diseases could be communicated to a patient other than by blood transfusion but pointed out that any accident such as a surgeon cutting himself and contaminating the operative site should be recorded in the surgery report--none was.

Carrier offered the affidavit of Dr. S, who is board certified in family practice. He was PD's treating physician from 1981 until her death. He is familiar with multiple blood tests taken from PD during that period and never observed anything to lead him to believe she carried or had Hepatitis B. He adds that the liver function test done on blood drawn on PD just five days before death indicated nothing to lead him to believe she had hepatitis.

Carrier also presented Dr. C, as an expert witness. (His credentials are not provided since he was stipulated to be qualified as an expert.) He reviewed the medical records of both claimant and PD. He agreed that the test that is specific for Hepatitis B was not performed on PD. He added later that such a test is not done on all patients and there was nothing that indicated it needed to be done on PD. Dr. C testified in regard to lab reports of PD's blood. He said that PD's transaminase levels were within normal limits and that if she had had Hepatitis B in the acute phase, elevated amounts would have been released by the liver and would be reflected in these levels. He added that her bilirubin was also normal. (Jaundice was not present.) When asked if he could give an opinion of whether PD had acute Hepatitis B, Dr. C replied that there was "almost no chance" that she had acute Hepatitis B. He added that within reasonable medical probability, claimant could not have contracted hepatitis from sticking PD and then herself. (Note: A person can be infected by a patient who is in the acute phase of Hepatitis B.)

Dr. C did not think PD could have gotten hepatitis just before coming to employer and pointed to the Operation Report which showed her own blood had been used. He said a person prior to the acute phase goes through an incubation period--during which time he or she has no signs or symptoms of the disease. Only during the last part of an incubation period--just prior to the clinical, acute phase--is the person contagious to others. He added that the incubation period is usually a few weeks to six months. When asked if it nevertheless were possible for a person who was totally asymptomatic to transmit Hepatitis B, he said it was "possible." He also said it was "possible" that the hearing officer had Hepatitis B.

Prior to the hearing on the merits, a hearing was held on January 13, 1992, to rule on carrier's motion for continuance of the hearing past its scheduled date of January 15, 1992. Claimant's first three assertions of error grow out of decisions made in regard to issues at the January 13, 1992 hearing. Carrier requested a continuance based on its

description of need to obtain medical evidence as to PD. It said that claimant had not provided PD's records in the exchange of documents required by the 1989 Act and rules of the Commission. It added that after the Benefit Review Conference Report was received (not forwarded to the parties until December 31, 1991), carrier decided it needed legal representation to prepare for the hearing and obtained the same. It cited the limitations in Rule 142.12 in regard to time required to issue a subpoena as a basis to ask permission for additional discovery under Rule 142.13(f). Claimant opposed these requests by pointing out that it had exchanged all records it had or expected to introduce but carrier had not provided any documents. It also argued that carrier's duty was to investigate the claim earlier in the process and that a bad decision as to when to hire a lawyer should not be the basis for a finding of good cause for a continuance for added discovery. Upon hearing both sides, the hearing officer found good cause to continue the hearing and ordered additional discovery.

The Appeals Panel in Texas Workers' Compensation Commission Appeal No. 91058, decided December 6, 1991, found that a hearing officer had not abused his discretion in allowing an exchange of documents after the time specified in Rule 142.13, in large part because the carrier (claimant at hearing) had changed his attorney and the new attorney had acted as soon as he could. In that case a continuance was also granted to allow additional preparation time and to gather necessary information. Also the panel in Texas Workers' Compensation Commission Appeal No. 91009, decided September 4, 1991, found that a hearing officer did find good cause by inferring such a finding in his act of admitting a medical opinion exchanged the same day as the hearing. The showing of ordinary prudence was described to be "minimal," but the panel did "not find it so lacking as to conclude the hearing officer abused his discretion in accepting the evidence." In the circumstances described by both parties in the case before us, we do not find that the hearing officer abused his discretion in ordering a continuance from January 15 to February 10, 1992.

The carrier argued that it was claimant who did not produce and exchange information pertinent to the disease process of patient PD. With the BRC held on December 19, the 15 days for exchange found in Rule 142.13 expired on January 3, 1992, but the BRC report was not forwarded until December 31, 1991. Carrier sought a continuance but claimant would not agree. With constraints as to time to seek discovery under the rule, the carrier could only ask for additional discovery to get PD's medical records. In answer to claimant's assertion of lack of compliance with Rule 142.13, carrier added that until it saw the medical records of PD, it did not know what other documents to accumulate in order to then exchange them with claimant. Documents carrier later introduced at the hearing on February 10, 1992, included only portions of claimant's medical records (received from claimant), medical records of PD, and a statement from Dr. S who had treated PD. As in his ruling on the continuance, we do not find the decision of the hearing officer to allow additional discovery to be an abuse of his discretion. (*See* Appeal No. 91058, *supra*).

Claimant's third point addresses "policy of the Act that requires strict compliance with

the Act and the rules to allow the dispute resolution process to go forward and to limit liability against the subsequent injury fund." While we have not addressed the speed necessary to protect the subsequent injury fund in a past opinion, this panel has called for observation of rules of discovery (*see* Appeal No. 91058, *supra*). A part of those rules to be followed does allow for the determination of the existence of good cause just as was exercised in the hearing of January 13, 1991. No error of policy was made.

Claimant argues that a nurse, BM, should not have been allowed to give opinion testimony since her profession limits a nurse's activities by statute and those activities allowed do not include making a diagnosis--the practice of medicine. While not addressing whether a TWCC hearing officer should be required to determine, and then rule upon, licensing restrictions of other state agencies, we point out from the record that claimant did not object to any of BM's testimony at hearing. Claimant's counsel did object to cross-examination of claimant, an LVN, which sought opinion testimony, but does not now raise this issue on appeal. Even had objection been made at the time to BM's testimony, "conformity to legal rules of evidence is not necessary." Article 8308-6.34(e) of the 1989 Act. Even if evidentiary rules were fully enforced, Rule 702 (Tex. R. Civ. Evid. 702) is not so restrictive as to foreclose a hearing officer's decision concerning opinion testimony of a registered nurse. If it were nevertheless found that the opinion of claimant should not have been allowed into evidence by the hearing officer, such error would not constitute reversible error since other competent evidence on the same matter prevented an improper judgment from resulting. Hernandez v. Hernandez, 611 S.W.2d 732 (Tex. App.-San Antonio 1981, no writ).

Finally, claimant states that the decision is against the great weight and preponderance of the evidence. On the contrary, the evidence is overwhelming in support of the hearing officer's decision. The claimant asserted that a particular patient caused her Hepatitis B. No evidence was presented that that patient, PD, had
Hepatitis B. No evidence was presented that Hepatitis B was present at employer or had ever been present there. *See* Schaefer v. TEIA, 612 S.W.2d 199 (Tex. 1980). The Schaefer court added that an opinion that said there was a "mere possibility" of disease constituted no evidence.

In addition, the hearing officer had evidence from the treating physician and from expert medical testimony that PD was not thought to have Hepatitis B. Indeed, tests conducted, while not specific for Hepatitis B, did not indicate PD had Hepatitis B; PD's symptoms were consistent with other disease processes and would not have indicated hepatitis if that disease were in its incubation stage; and expert medical opinion stated that within reasonable medical probability PD did not have Hepatitis B. As stated in Texas Workers' Compensation Commission Appeal No. 91113, decided January 27, 1992, there must be "evidence of probative force of a causal connection between the employment and occupational disease." The decision of the hearing officer is not against the great weight and preponderance of the evidence and is affirmed.

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Joe Sebesta
Appeals Judge

CONCUR:

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Susan M. Kelley
Appeals Judge

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Philip F. O'Neill
Appeals Judge